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In the Supreme Court of the United States

OCTOBER TERM, 1984

KERR-McGEE CORPORATION, PETITIONER

v.

NAVAJO TRIBE OF INDIANS, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENTS**

REX E. LEE

Solicitor General

F. HENRY HABICHT II

Assistant Attorney General

LOUIS F. CLAIBORNE

Deputy Solicitor General

JOHN A. BRYSON

Attorney

Department of Justice

Washington, D.C. 20530

(202) 633-2217

38/24

QUESTION PRESENTED

Whether an Indian Tribe that has no written constitution and is not subject to the Indian Reorganization Act of 1934 may tax nonmembers engaged in business activities on the Reservation without first obtaining the approval of the Secretary of the Interior.

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INTEREST OF THE UNITED STATES

It is superfluous, at this day, to recapitulate the history underlying the unique relationship between the government of the United States and the surviving Indian Tribes. The enduring reality, as this Court has repeatedly stressed, is that tribal Indians are the "wards of the Nation." *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States v. Kagama*, 118 U.S. 375, 383-384 (1886); *Morton v. Mancari*, 417 U.S. 535, 551-553 (1974). In consequence, the United States enjoys unusual powers over Indian affairs, and, correspondingly, owes the Tribes a special duty of protection. *Ibid.* And, equally important, where Congress has not intervened, that obligation calls for vindication of tribal autonomy and respect for the Tribe's governmental institu-

(1)

tions. *E.g.*, *Worcester v. Georgia*, 31 (6 Pet.) 515 (1832); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *New Mexico v. Mescalero Apache Tribe*, No. 82-331 (June 13, 1983). Indeed, in recent years, this aspect of the relationship has been emphasized in congressional commitments to encourage tribal self-government and self-sufficiency—commitments which are, of course, binding on the Executive Branch.

The upshot is that the United States has an obvious interest in the question presented here. We cannot be indifferent to the issue whether tribal taxation bearing against nonmembers doing business on an Indian Reservation does or does not require the approval of federal officers. Not only will the answer immediately affect the future practice of the Department of the Interior, but the ruling will either endorse or fault the Government's longstanding view of its statutory discretion in the premises. For these reasons, the United States has participated below in this case and in similar litigation in the Tenth Circuit. We deem it appropriate also to submit a brief here, now that this Court has determined to review the question.

STATEMENT

1. In 1978, the Navajo Tribal Council, the governing body of the Navajo Tribe of Indians, enacted two ordinances imposing taxes known as the Possessory Interest Tax and the Business Activity Tax (J.A. 38-64). The Possessory Interest Tax is measured by the value of leasehold interests in tribal lands; the rate of taxation has remained at 3% of the value of those interests (J.A. 41-43). The Business Activity Tax is assessed on receipts from the sale of personal property produced or extracted within the Navajo Nation, or from the sale of

services within the Reservation (J.A. 52-56).¹ The tax basis is calculated by allowing a standard deduction and subtracting specified expenses (J.A. 55-56).

The two taxes are applicable to both Navajo-owned enterprises and non-Indian businesses (J.A. 41, 52-55). Taxpayers dissatisfied with the assessment enjoy the right of appeal to the Navajo Tax Commission and the Navajo Court of Appeals (J.A. 44-45, 60-61).

After the enactment of the ordinances, the Navajo Tribe submitted them to the Bureau of Indian Affairs of the United States Department of the Interior for an opinion as to whether they required federal approval. The Bureau responded that neither tax was subject to approval or disapproval by the Department of the Interior (J.A. 65-66, 68-71).

2. Before any tax payments were made, petitioner, a substantial mineral lessee on the Navajo Reservation, brought this action in the United States District Court for the District of New Mexico seeking to invalidate the ordinances (J.A. 4-37). The present proceedings result from the transfer to the District Court for Arizona of that portion of the complaint that related to petitioner's mineral operations in that State (Pet. App. B2). Meanwhile, a similar suit was instituted by other companies in the District Court for Utah. One claim in each case was that the taxes were invalid without approval by the Secretary of the Interior (J.A. 32-33). In 1982, the district court in Utah sustained such a challenge. *Southland Royalty Co. v. Navajo Tribe of Indians*, No. 79-0140. The district court in the case at bar then reached the same conclusion, holding that the Tribe was collaterally estopped by the decision in *Southland Royalty* (Pet. App. B4-B9), and that, in any event, Secretarial approval was a prerequisite to the effectiveness of the tax ordinances (Pet. App. B9-B14).

¹ If the property is produced on the Reservation but removed before sale, it is valued as of the time of the property leaves the jurisdiction (J.A. 53).

The Tribe appealed that judgment to the Court of Appeals for the Ninth Circuit. In the meantime, the Tenth Circuit reversed in *Southland Royalty*, holding that no approval by the Secretary was required. 715 F.2d 486 (1983), petition for rehearing pending. Then, on April 17, 1984, the Ninth Circuit issued its decision in this case, agreeing with the Tenth Circuit on the issue of Secretarial approval (Pet. App. A11-A12).

INTRODUCTION AND SUMMARY OF ARGUMENT

For well over a century, Indian Tribes have been taxing nonmembers doing business on the Reservation with the full acquiescence of all three Branches of the federal Government. It has always been understood, moreover, that this represents an aspect of continuing tribal sovereignty, not a new prerogative conferred by the United States. Accordingly, the only question is whether Congress has taken away the pre-existing power or has conditioned its exercise. This Court only recently has confirmed that tribal taxing authority over nonmembers engaged in on-Reservation business activities generally has survived. In the present case, it is nevertheless argued that, by virtue of the Indian Reorganization Act of 1934 or the Indian Mineral Leasing Act of 1938, this is no longer true with respect to taxation of mineral lessees by Tribes that rejected the benefits of the 1934 Act. We briefly address this extravagant claim, but primarily discuss the alternative contention that, for all Indian Tribes, tax ordinances bearing on nonmembers are effective, as a matter of federal law, only if and when approved by the Secretary of the Interior.

In our submission, the court of appeals here, like the Tenth Circuit in the *Southland Realty* case, correctly rejected the argument. It is true that, for some years, it was common practice to submit taxing measures to Interior Department review, albeit it does not appear that any such ordinance has been disapproved as unwarranted or excessive—in all the years between *Morris*

v. *Hitchcock*, 194 U.S. 384 (1904), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). See also, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (8th Cir. 1956); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959); F. Cohen, *Handbook of Federal Indian Law* 131 & n.74 (1942). But the significant point is that no federal law so required—except for the special case of the Five Civilized Tribes in Oklahoma, all of whose legislation had to be submitted to Presidential veto during the eight years before their governments were effectively abolished in 1906. Secretarial review of tax ordinances reaching nonmembers—and often much else—was a consequence of tribal constitutional provisions through which the Tribe bound itself to submit its action to federal administrative approval. Whether such “delegations” were wholly voluntary, or prompted, or even exacted, by the Bureau of Indian Affairs is immaterial. The fact is that Congress never mandated the screening procedure.

Indeed, one searches the statute book in vain for any hint, much less the “clear indication” required, that Congress intended to subject the taxing power of Indian Tribes to Executive Department veto. As we show in the pages that follow, nothing in the Indian Trader statutes, the Indian Reorganization Act or the Indian Mineral Leasing Act can be read to impose such a condition on the exercise of this fundamental governmental power. And as this Court has noted, more recent congressional enactments reflect a commitment to encouraging greater, not less, tribal self-government, and promoting self-sufficiency. It is therefore not surprising that the Department of the Interior has at all periods deemed itself free to make exceptions, approving tribal constitutions that do not require prior administrative approval of tax measures, and that, in light of the relative success of “reorganization,” the Department today encourages the

elimination of the traditional Secretarial review clauses in tribal constitutions. It follows, of course, that the Navajo, who have never adopted a written constitution, are free to enact tax ordinances like those in suit without obtaining prior approval from the Secretary.

The result is in no way anomalous or unjust. Congress has required approval by the Secretary of the Interior before a Tribe can alienate or encumber its land or enter into specified contracts. And, by statute, traders must obtain federal permission before selling goods in Indian country. But these laws are designed to protect the Indians against imposition by unscrupulous outsiders. Obviously enough, the same risks are not implicated by tribal taxation of nonmembers and it is therefore not surprising that no comparable statutory condition has been enacted in the present context. Nor would a Secretarial veto be an appropriate means of affording the taxpayers a voice in the matter. The Secretary of the Interior properly may act as guardian of Indian Tribes to shield them from potential improvidence, but he does not "represent" the adverse interest of non-Indian mineral lessees. They have entered the Reservation with a view to commercial profit and there is nothing unfair in their being required to submit to taxation by the local government that provides substantial services.

ARGUMENT

It is now firmly settled that, except as Congress may have limited or conditioned its exercise, Indian Tribes today retain, as a residual aspect of aboriginal sovereignty, the inherent power to tax non-Indians who conduct business within the Reservation. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-148 (1982). See, also, *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980). Accordingly, unless some provision of federal or tribal

law otherwise provides, it can make no difference in the case of any Tribe whether its general taxing authority or the particular tax has been approved by the federal Government: retained inherent powers, not derived from the United States, do not, in principle, require further "authorization" from the national sovereign before they are exercised.

The only question, then, is whether, although permitting tribal taxing power over nonmembers to continue, Congress has decided to condition it by imposing "constraints" on its exercise or erecting "checkpoints that must be cleared before a tribal tax can take effect." *Merrion*, 455 U.S. at 141, 155. The Court, it is true, has used these words in the context of a tax ordinance enacted by a Tribe organized under the Indian Reorganization Act of 1934 (I.R.A.) which had adopted a constitution requiring the Secretary of the Interior's approval of taxes on nonmembers. *Ibid.* And it is now suggested that, at least in respect of taxes bearing on mineral lessees, Secretarial approval is equally required in the case of Tribes, like the Navajo, who rejected the I.R.A. and are not bound by any tribal constitutional provision to obtain the Secretary's permission. There is, indeed, a more extreme submission to the effect that Congress has wholly deprived "nonconforming" Tribes, not reorganized under the I.R.A., of any such taxing authority. We address these novel arguments by revisiting the federal legislation which might have conditioned the exercise of the power to tax on Secretarial approval—but did not do so.

1. At the outset, it is well to remind ourselves that, in relatively recent times, Indian Tribes taxed non-Indians doing business in the Indian country without seeking or obtaining any approval from federal officials. A sufficient example, twice pointedly cited by this Court as a persuasive precedent, is an 1876 law of the Chickasaw Nation imposing an occupational license tax on non-Indians engaged as laborers, merchants, traders or physi-

cians within the Chickasaw territory. See *Morris v. Hitchcock*, 194 U.S. 384, 389-390 (1904); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 139-140. That statute was duly enacted under the Chickasaw Constitution of 1867, which established a formal governmental structure with three branches, including a bicameral legislature and a Governor, and required no submission of any legislation to federal officials. 9 *The Constitutions and Laws of the American Indian* 1-19 (1975).² The local Indian Agent criticized the tax (see Annual Report of the Commissioner of Indian Affairs for the Year 1877, at 110) and later apparently sought to annul it. See A. Debo, *The Rise and Fall of the Choctaw Republic* 140 (1934). The Secretary of the Interior vacillated, but, by 1881, he had firmly upheld the validity of such permit laws, notwithstanding they were enacted without prior authorization from the United States or subsequent ratification by its officers. See *id.* at 140-142; Annual Report of the Commissioner of Indian Affairs for the Year 1881, at 104.

What is more, the contemporary Congress specifically considered and acquiesced in this exercise of tribal power. See S. Rep. 698, 45th Cong., 3d Sess. 1-3 (1879),³ par-

² On its face, the 1867 Constitution indicates that it was itself adopted and promulgated without soliciting or obtaining federal approval. That had been the pattern for the earlier constitutions of the Chickasaws. See G. Foreman, *The Five Civilized Tribes* 121-122, 131 (1934); A. Debo, *A History of the Indians of the United States* 151, 169-173 (1970).

³ Petitioner appears to suggest that this Senate Report acknowledges tribal taxing power only when exercised "subject to the supervisory control of the Federal Government" (Pet. Br. 22-23). To be sure, the Senate Report (at 1 (emphasis added)) asserts federal power, implemented "by treaty or act of Congress," to "restrain[] and abridge[]" the tribal "right of self-government and jurisdiction over the persons and property within the limits of the territory [the Indians] occupy." But there is no claim that tribal enactments not inconsistent with federal law must win the approval of Executive Branch officials before becoming effective.

tially quoted in *Morris*, 194 U.S. at 389-390, and *Merrion*, 455 U.S. at 140. See also 7 Cong. Rec. 2911 (1878); 8 Cong. Rec. 929 (1879). Shortly thereafter, three Attorneys General gave formal opinions sustaining this and like permit taxes. 17 Op. Att'y Gen. 134, 135 (1881); 18 Op. Att'y Gen. 34, 35 (1884); 23 Op. Att'y Gen. 214, 216, 217 (1900).⁴ And, finally, the tribal tax laws were upheld in judicial decisions that this Court has cited with approval. *Maxey v. Wright*, 54 S.W. 807, 809-810, 812 (C.A. Ind. Terr.), *aff'd*, 105 F. 1003 (8th Cir. 1900);⁵ *Crabtree v. Madden*, 54 F. 426, 429 (8th Cir. 1893). See *Merrion*, 455 U.S. at 140, 141. One might have hoped that this resolution of the question, after full considera-

On the contrary, the Committee reproduced the full text of the Chickasaw law (Senate Report 3-4) and declared it "not invalid" (*id.* at 3), notwithstanding it obviously had not been approved by any federal official.

⁴ The Chickasaw enactment of 1876 is far from unique. Several dozen comparable tribal tax laws, all equally effective without federal approval, are to be found even in the very incomplete reprint of the laws of the Oklahoma Tribes entitled *The Constitutions and Laws of the American Indian*, *supra*. Among them are 1839 Choctaw enactments taxing all merchants (13 *id.* at 32), and traders (13 *id.* at 36); Muskogee (or Creek) laws of 1880 and 1881 taxing noncitizen traders (27 *id.* at 60-61), lawyers (28 *id.* at 83-84), residents (28 *id.* at 95), and miscellaneous occupations from hotelkeeping to selling shoes (28 *id.* at 106); an Osage law in force in 1882 taxing noncitizen cattle drovers (31 *id.* at 25); an 1885 law of the Sac and Fox taxing noncitizen lawyers (31 *id.* at 22); and a Chickasaw law of 1887 taxing mechanics (10 *id.* at 202).

⁵ Petitioner misleads when it asserts that "each of the three early cases pre-dating the IRA upon which the *Merrion* Court relied" involved "[f]ederal supervision and approval of tribal taxes" (Pet. Br. 19-20). The appellate court opinion in *Maxey v. Wright* did refer to the "superintending control of the interior department over the Creeks" (*id.* at 20), but this was said in support of the Department's authority to implement the tribal tax law by collecting it from the recalcitrant non-Indian. See 54 S.W. at 810. It is nowhere suggested that the tax law had been, or was required to be, approved by any federal official. And, indeed, it seems clear that the enactment never was submitted for review.

tion by all three branches of Government, would make it unnecessary to retrace the same ground a century later.

To be sure, in the special case of the Five Civilized Tribes, whose governments were reported to have become "wholly corrupt, irresponsible, and unworthy to be longer trusted" (see *Stephens v. Cherokee Nation*, 174 U.S. 445, 453 (1899)), Congress later subjected tribal legislation, including tax measures, to "a veto power in the President." *Morris v. Hitchcock*, 194 U.S. at 393. See Act of June 7, 1897, ch. 3, § 1, 30 Stat. 84; Act of June 28, 1898, ch. 517, §§ 29, 30, 30 Stat. 512, 518; Act of Mar. 1, 1901, ch. 676, para. 42, 31 Stat. 872; Act of Mar. 3, 1901, ch. 832, § 1, 31 Stat. 1077; Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 148. But this was a temporary solution to a localized problem arising in the context of Tribes whose autonomy was to be entirely extinguished in a very few years.⁶ The federal "check," moreover, was not confined to "external" legislation affecting non-Indians: it applied across the board to all enactments of the Civilized Tribes.

It may well be that the fate of these large and once most independent "Nations" effectively discouraged lesser Tribes from attempting to assert taxing power over non-Indians during the "dark age" of the American Indian that followed the turn of the Century. Yet, obviously,

⁶ Tribal governments were to cease altogether not later than 1906. See Act of June 28, 1898, ch. 517, § 29, 30 Stat. 512; Act of Mar. 1, 1901, ch. 675, para. 58, 31 Stat. 858; Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 725. Although the plan for total abolition of tribal government was not fully carried out, the power of taxation was explicitly ended in 1906. Act of Apr. 26, 1906, ch. 1876, § 11, 34 Stat. 141. Even so, it is noteworthy that in their last years of limited self-government, the Civilized Tribes enacted and the President approved a number of tax laws affecting non-Indians. See 23 Op. Att'y Gen. 528 (1901); *Morris v. Hitchcock*, *supra*; *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906). We do not, of course, intend any comment on the present status and powers of the Five Civilized Tribes as a result of more recent legislation.

sovereign prerogatives are not irrevocably lost merely because, for a time, they remain unexercised as a result of fear or apathy or corruption. See *Merrion*, 455 U.S. at 173-174 n.24 (Stevens, J., dissenting); cf. *United States v. John*, 437 U.S. 634, 652-653 (1978). What matters is whether Congress acted—beyond the confines of Oklahoma—to extinguish the inherent authority of Tribes to tax those who entered their domain or to condition its exercise on federal approval. This Court has already dismissed the suggestion that a statute enacted in 1927 inhibits tribal taxing power in the mineral leasing context, and has also rejected at least one like argument under the Indian Mineral Leasing Act of 1938. *Merrion*, 455 U.S. at 150-151.⁷ As we now show, there is no other legislation even arguably sufficient to the purpose.

2. Ironically, the notion that prior permission from the Secretary of the Interior is required before an Indian Tribe may tax nonmembers is traceable to the early days of the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. 461 *et seq.*), a statute designed to restore a measure of political autonomy and economic self-sufficiency to the surviving Tribes. The requirement of Secretarial approval is not, however, a result fairly attributed to Congress, which never mandated any such condition, even for Tribes that accepted the I.R.A. Rather, the practice represents a discretionary decision of the Bureau of Indian Affairs, which wrote Secretarial review

⁷ We refer specifically to the Act of Mar. 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. 398a *et seq.*; and the Act of May 11, 1938, ch. 198, 52 Stat. 347, 25 U.S.C. 396a *et seq.* But the same reasoning equally applies to earlier legislation permitting States to tax the extraction of Indian Reservation minerals, without any mention of tribal taxing power, notably: the Act of June 30, 1919, ch. 4, § 26, 41 Stat. 31, 25 U.S.C. 399 ("solid" minerals); the Act of Mar. 3, 1921, ch. 119, § 26, 41 Stat. 1248 (Quapaw Reservation); the Act of Mar. 3, 1921, ch. 120, § 5, 41 Stat. 1250 (Osage Reservation); and the Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. 398 (treaty Reservations).

provisions into many tribal constitutions without any direction from Congress.

As the Court has noted (*Merrion*, 455 U.S. at 155), the I.R.A. provides that covered Tribes must obtain the Secretary's approval for any new or amended constitution adopted pursuant to the Act. 25 U.S.C. 476. And it is undeniable that in 1935, 1936 and 1937 the typical tribal constitution—often written by the B.I.A.—required Secretarial ratification of any tax measure affecting non-Indians. See F. Cohen, *Handbook of Federal Indian Law* 143 (1942); *Federal Indian Law* 408-413, 439 (U.S. Dep't of the Interior 1958); Strickland, Wilkinson, et al., *Felix S. Cohen's Handbook of Federal Indian Law* 149-150, 435-436 & n.48 (1982).⁸ But no law so ordained, and, in fact, the practice was not invariable.⁹ Indeed,

⁸ Although these are, in principle, three successive editions of the same book, they vary substantially on some issues. Hereinafter, the original Cohen volume is cited "Cohen, *Handbook*," the 1958 revision "*Federal Indian Law*," and the 1982 revision "*1982 Handbook*."

⁹ The clearest example of an exception is the 1937 Constitution of the Saginaw Chippewa Tribe, which authorized the tribal council, without Secretarial approval, to "create and maintain a tribal council fund by levying taxes or assessments against members or nonmembers for the use of property and facilities which belong to the organization." Art. VI, § 1(g), reprinted in 15 G. Fay, *Charters, Constitutions and By-Laws of the Indian Tribes of North America* 79, 82 (1967-1981).

In at least three other cases, tribal constitutions approved in 1937 made no express reference to nonmembers but authorized the enactment, without Secretarial review, of ordinances providing "for the levying of taxes and the appropriation of available tribal funds for public purposes of the * * * Tribe." Constitution of the Iowa Tribe in Nebraska and Kansas, Art. IV, § 1(f), in 14 Fay 29, 30; Constitution of the Kickapoo Tribe in Kansas, Art. V, § 1(f), in 14 Fay 15, 17; Constitution of the Sac and Fox Tribe of Missouri, Art. V, § 1(f), in 14 Fay 39, 41. See, also, the 1954 Amended Constitution of the San Carlos Apache Tribe (Art. V, § 1(k)) and the 1955 Amended Constitution of the Hualapai Tribe (Art. V, § 1(m)), both of which broadly empower the tribal council "to levy and collect taxes" without Secretarial approval, in 4 Fay

the contemporaneous formal published opinion of the Interior Department concerning the inherent powers of Indian Tribes did not say or imply that tribal tax ordinances reaching non-Indian activities, except for the special case of licensed traders, must be submitted for Secretarial approval. See *Powers of Indian Tribes*, 55 Interior Dec. 14, 46, 50 (1934), quoted in *Colville*, 447 U.S. at 152-153, and *Merrion*, 455 U.S. at 139.¹⁰

36, 37-38; *id.* at 89, 91; and the 1958 Amended Constitution of the Pueblo of Laguna (Art. IV, § 1(e)(4)), which requires no Secretarial review of ordinances "levy[ing] taxes," in 5 Fay 73, 77.

Finally, some constitutions, like the original 1937 Constitution of the Jicarilla Apache Tribe, simply made no specific reference to taxation at all. See *Merrion*, 455 U.S. at 134, 148-149 n.11. This does not affect the survival of the power of taxation, but its "effectuation" through an ordinance enacted by the tribal council might be inhibited because the council lacked delegated authority from the Tribe in the premises. *Merrion*, 455 U.S. at 148-149 n.11. In the particular case of the Jicarilla Apache, the situation was ambiguous: on the one hand the members had made an unrestricted grant of legislative power to the tribal council, subject only to "any limitations imposed by the Constitution and Statutes of the United States" (Art. VI, § 1); on the other hand, the only reference to enactments, vaguely defined as intending "to protect the peace, safety, morals and general welfare of the reservation," expressly provided for Secretarial review (Art. VI, § 4). In these circumstances, it may be doubted whether amendment of the constitution was strictly necessary to enable the council to enact a taxing ordinance with Secretarial approval—albeit the question is presumably one of tribal law. Cf. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 493 (1979).

¹⁰ It is worth noting, also, that Felix Cohen, then the prime authority on Indian law, never purported to justify such Secretarial approval clauses for tax ordinances on the ground that they were required by federal law. In his *Handbook*, first issued in 1942, he reproduces the typical taxation clause found in I.R.A. constitutions of that day without even commenting on the Secretarial review aspect of the provision. *Id.* at 143. Any reader familiar with Cohen's work will appreciate that this silence is not inadvertent: plainly, the author knew the preclearance requirement reflected a policy decision, not a legal requirement. See, also, *id.* at 130-133.

3. At all events, it is perfectly clear that the I.R.A. does not govern Tribes, like the Navajo, who declined to accept its provisions. 25 U.S.C. 478 and 478b. Although most Indian Tribes embraced the new law in 1934 and 1935, some 77 did not. See Haas, *Ten Years of Tribal Government Under the I.R.A.* 3, 13-20 (1947); 1982 *Handbook* 150 & n.48. Many of the "recalcitrant" Tribes already had constitutions or other organic laws. See Cohen, *Handbook* 128-129 & n.59. A number of other Tribes soon adopted constitutions, often obtaining the express approval of the Secretary of the Interior, albeit outside the I.R.A. See Getches, Rosenfelt & Wilkinson, *Cases and Materials on Federal Indian Law* 302, 306-307 (1979); Haas, *supra*, at 11-12. Most of those instruments required Secretarial approval of taxing ordinances bearing on nonmembers. *E.g.*, the Lummi and Colville Constitutions, noted in *Colville*, 447 U.S. at 143 n.11, 144. See, also, Getches, et al., *supra*, at 304. Others recited no such restriction. *E.g.*, the Constitution of the Agua Caliente Band of Mission Indians, which authorizes the tribal council, without secretarial review, "to promulgate and enforce assessments or permit fees upon nonmembers doing business and obtaining special privileges within [the] Reservation." Art. V, § 9, in 8 *Fay* 33, 36a. And several Tribes, the Navajo among them, have never had a written constitution, and therefore suffer under no "internal" impediment to the exercise of all subsisting sovereign powers.¹¹

¹¹ Presumably, the question of express delegation of tribal powers to a "legislative" council does not arise in the case of the Navajo. As the recently issued Bureau of Indian Affairs, U.S. Dep't of the Interior, *Guidelines: Review of Tribal Ordinances Imposing Taxes on Mineral Activities* § 1.6(B)(2)(a) (Jan. 18, 1983) make clear: "Unless their powers are specifically limited by the tribal documents which established them, the governing bodies of tribes without written constitutions will be considered to possess the authority to exercise the inherent power of the tribe to tax." (The *Guidelines* are reproduced as an appendix to the Brief for Respondents.). See pages 25-26, *infra*.

Thus, the situation of Tribes that rejected the I.R.A. varies according as they have, or have not, voluntarily bound themselves to submit their taxing ordinances to the Secretary of the Interior for review. But in no case is the result attributable to the Indian Reorganization Act. Even for Tribes that accepted "reorganization," the I.R.A. is in no degree the source of the power to tax nonmembers. Obviously, then, the statute did not abrogate or condition this pre-existing prerogative in respect of Tribes to whom the law explicitly does "not apply" (25 U.S.C. 478) because they rejected it. Nothing can change this reality, whatever exaggerated representations occasionally may have been made by zealous officials of the Bureau of Indian Affairs seeking to persuade various Tribes to accept the benefits of the I.R.A. See also page 25, *infra*.

4. Despite exceptions, the pattern just summarized may be taken to reveal a prevailing administrative view in the mid-1930s, and continuing for some time thereafter, to the effect that tribal taxation of non-Indians—like much else—generally ought to be supervised by the Bureau of Indian Affairs.¹² That, and no more, is what should be inferred from the practice of the Bureau of including a Secretarial review clause for any such taxing ordinance in most contemporary tribal constitutions, whether or not adopted under the I.R.A. This does not reflect any construction of recently enacted legislation. Whether or not it was then appropriate, or prudent, to insist on federal screening of tribal action that would affect non-Indians,¹³ the policy cannot be attributed to

¹² Another example is the common stipulation in I.R.A. constitutions that ordinances excluding nonmembers from the restricted lands of the Reservation must be submitted to the Secretary of the Interior for review. See Cohen, *Handbook* 143. Presumably, no one would argue that any Act of Congress requires prior federal approval for the exercise of tribal power to exclude. See *Merrion*, 455 U.S. at 173-186 (Stevens, J., dissenting).

¹³ It is fair to note that, in some instances, the Tribe, captive to the long habit of looking to the Indian Service for all decisions,

Congress and did not legally affect the prerogative of Indian Tribes other than those who, for the time being, "contracted away" their autonomy in the matter of taxation. It may seem odd that, in this respect, most of the Tribes that accepted the I.R.A. are, at least nominally, less independent. But that is only because they were more directly under the control of the Indian Bureau when their constitutions were written.¹⁴ And, in any case, the strings are now being cut.

Indeed, without any change in statutory law, the Department of the Interior, in recent years, has counseled against provisions requiring submission of taxing ordinances to the Secretary for review.¹⁵ And several

had to be restrained from delegating away too much, such as attempting to grant all taxing power to the Reservation Superintendent. See Cohen, *Handbook* 131 & n.74.

¹⁴ It is an all too familiar charge that, for many years, the I.R.A. "illustrates how a law intended to strengthen Indian governments and to give the people responsible business experience through making their own decisions * * * in fact actually increased federal control over them." W. Brophy & S. Aberle, *The Indian: America's Unfinished Business* 34 (1966). See, also, M. Price, *Law and the American Indian* 717-730 (1973); E. Cahn, *Our Brother's Keeper: The Indian in White America* 5-8, 10-13, 14-16, 112-139, 143-145 (1969). But see Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 Am. Anthropologist 279 (1984). That tendency, however, has now been reversed. See President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983).

¹⁵ E.g., one Bureau of Indians Affairs position paper entitled *Drafting and Reviewing Proposed Tribal Constitutions and Amendments*, Jan. 1981, at 5 recites:

In only a few cases does a Federal Statute require that tribal enactments be subject to approval by the Secretary of the Interior. The approval of attorney contracts is an example. In those instances, Bureau policy is to include mention of that requirement in the powers article as long as this is required by Federal Law. Because of the turnover of persons both in the Bureau and the tribe, it is useful to have such language to avoid failure to comply with the law.

tribal constitutions have now been amended with Interior Department concurrence so as to remove the requirement of submitting such ordinances to Secretarial approval.¹⁶ This does not necessarily represent a shift of policy. It may be no more than a recognition of the relative success of the effort, initiated in 1934, to promote responsible tribal self-government, so that, today, Indian Tribes are fully capable of tailoring their taxation program to meet tribal needs without driving away important taxpayers.

At all events, there is no reason to suppose Congress intended to entrench a single permanent rule. Every indication is that the Indian Service was left free to vary

On the other hand, we encourage the elimination of provisions in many constitutions requiring Secretarial review. This is not required by Federal law.

By a Memorandum dated Jan. 13, 1984, this paper was distributed to all Area Directors of the Interior Department as a guide in reviewing tribal constitutions.

¹⁶ As early as 1975, the Mississippi Band of Choctaw adopted, and the Department approved, a revised constitution that did not require Secretarial review of taxing ordinances. Art. VIII, § 1(r). The Constitution of the Lac Courte Oreilles Band of Lake Superior Chippewa was amended in 1978, with Department agreement, to permit the imposition of "taxes or license taxes upon members and nonmembers doing business within the reservation," without Secretarial review. Art. V, § 1(n). In November 1980, the Port Gamble Indian Community of Washington amended its Constitution, with Department approval, so as to delete the requirement of Secretarial review for ordinances "providing for the licensing of nonmembers coming upon the reservation for purposes of hunting, fishing, trading, or other business." Art. IV, § 1(f). And the approved constitution adopted by the Fort Mojave Tribe in 1977 requires no Secretarial review of ordinances "regard[ing] the use of all reservation lands through zoning, taxation or otherwise," or "provid[ing] * * * the conditions upon which non-members may enter or remain on the reservation." Art. IV, § 1(L) and (O). See also the amended constitutions of the San Carlos Apache and the Hualapai Tribes and the Pueblo of Laguna, noticed at note 9, *supra*.

its practices in different settings and to alter them from time to time as changing circumstances might suggest. That is certainly how the Department of the Interior understood its task. It would be quite wrong to treat the early practice of writing Secretarial review provisions into tribal constitutions as reflecting a contemporaneous construction of controlling statutes as mandating that result. On the contrary, what should be accorded deference is the continuing administrative view that Congress never directed the Secretary to insist upon review of tax ordinances.

5. It is no contradiction that, at some periods, the B.I.A. asserted power independent of the I.R.A. and the Tribe's constitution to screen and veto some or all tribal enactments. See Getches, et al., *supra*, at 306-307. To claim such authority is not to say that tribal ordinances are invalid and without effect unless and until approved by the Secretary or his delegate. At least in the present context, one can assert a veto power in the Secretary and, at the same time, declare that affirmative approval is not a prerequisite to the effectiveness of the Navajo taxing ordinance. That is no different than the position of the Interior Department with respect to Tribes operating under I.R.A. constitutions: Through his power to disapprove new or amended constitutions, the Secretary can insist that taxing ordinances be submitted to his review or, as is current practice, he can encourage deletion of that requirement so that such ordinances become effective without his "pre-clearance."

The true rule, as it seems to us, was well summarized in a 1959 Memorandum from the Interior Solicitor's Office (J.A. 67):

It has been emphasized that "Indians are not wards of the Executive officers, but wards of the United States." (*Ex Parte Bi-A-Lil-Le*, 100 Pac 450 (1909); see Fed. Indian Law, 1958, p. 563)). Congress has not required the Secretary to approve tribal ordinances, nor has the President or the Secretary,

under authority delegated by Section 2 of 25 U.S.C., seen fit to issue regulations referring to Secretarial consideration or approval of tribal ordinances. Many tribal constitutions adopted pursuant to Section 16 of the Indian Reorganization Act (25 U.S.C. 476, 48 Stat. 987), contain provisions implying Secretarial consideration of tribal ordinances, at least, in special cases. These provisions were inserted by the Tribe with the consent of the Secretary. This is within his authority, but it is not a Congressional mandate.

Of course, as the quoted Memorandum recognizes (J.A. 67-68), there are some few cases—including encumbrances of tribal property—in which a statute expressly requires Secretarial approval. But taxation, even of non-members, is not such an instance.

6. Nor is it relevant, at least in the present context, that the Indian Trader statutes, 25 U.S.C. 261-264, were sometimes deemed to require federal approval of tribal taxation of licensed traders. That proposition is commonly attributed to an Opinion by Attorney General Wirt in 1824. 1 Op. Att'y Gen. 645, 649-650. In fact, however, the Attorney General was construing provisions of treaties with the Cherokees by which they were deemed to have *voluntarily relinquished* to the United States all regulatory power over traders. *Id.* at 646-649, 650, 651-652. See *Maxey v. Wright*, 54 S.W. at 808.¹⁷ Plainly enough, this is quite different from a holding that Congress unilaterally stripped all Tribes of their former power to tax traders. The latter point, it is true, has been mooted from time to time within the Interior Department. See 55 Interior Dec. 14, 48, 66, (1934); 60 Interior Dec.

¹⁷ It should also be noted that Attorney General Wirt was writing in a day when three now discredited doctrines held sway: that divided authority in Indian affairs and the regulation of commerce is unnatural, if not impossible; that federal permittees automatically enjoy the tax immunity of the United States itself; and that the power to tax is tantamount to "a power to destroy." See 1 Op. Att'y Gen. 645, 647-648, 650 (1824).

176 (1948); Cohen, *Handbook* 267; *Federal Indian Law* 381, 437.¹⁸ But the very limited scope of the "peculiar exemption" was noted more than a century ago. See 18 Op. Att'y Gen. 34, 38-39 (1884). And, significantly, it has never won endorsement from any court, despite repeated opportunities from *Crabtree v. Madden* in 1893 to *Merrion v. Jicarilla Apache Tribe* in 1982. On the contrary, the proposition was expressly rejected in *Mazey v. Wright*, *supra*.

In our submission, it is quite wrong to read a law that preempts regulation and taxation of Indian traders by the State (*Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980)), as necessarily also foreclosing tribal taxation. After all, the Indian Trader statutes were intended to benefit the Tribes by erecting a protective shield, or screen, against potentially unprincipled or hostile outsiders. The trader does not enjoy immunity because Congress was concerned to spare him, but only because the economic burden of any State tax would fall on the Indian consumer, without any compensating advantage to the Tribe. Obviously, this rationale is wholly inapplicable when the Tribe itself is, in effect, taxing its own citizens, presumably with their consent. Thus, it is extravagant to construe the Act of Aug. 15, 1876, ch. 289, § 5, 19 Stat. 200, now 25 U.S.C. 261, which vested "sole power and authority" to regulate traders in the Commissioner of Indians Affairs, as immunizing them from tribal taxes. So Congress evidently believed, since three years later, in 1879, it accepted the validity of the Chickasaw permit law that taxed, among others, licensed traders. See pages 7-9, *supra*.

At all events, the point is mooted in the case of the Navajo by a Department regulation that expressly permits tribal taxation of traders. 25 C.F.R. 141.11. See

¹⁸ The basic soundness of the proposition has been questioned in the most recent comprehensive treatise on Indian law. 1982 *Handbook* 436-437.

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. at 689-690. Besides, the mineral lessees involved here do not remotely fit the category of "licensed Indian traders." Although the fact is not dispositive (see *Central Machinery*, 448 U.S. at 165), it is instructive that they hold no licenses from the Commissioner of Indian Affairs under 25 U.S.C. 261. And, more important, they are not selling or bartering "goods," the only activity for which the statutes require a license. Cf. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616 (1980). Accordingly, oil and gas producers are no more within the reach of the license law than the logging company in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), or the building construction firm in *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982). Indeed, petitioner does not claim otherwise.

7. We must, however, address a related contention advanced under the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. 396a *et seq.* The assertion is that, except for Tribes organized under the I.R.A., the 1938 statute has preempted any pre-existing power to tax mineral production, or, at least, has conditioned any exercise of that power on Secretarial approval. Both versions of the argument wholly misapprehend the intent of Congress.

The stated prime objectives of the 1938 Act were to maximize tribal revenues from Reservation lands, to eliminate the gaps resulting from the existing patchwork of special provisions, and, with a single comprehensive statute, "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes"—all "in harmony with the Indian Reorganization Act." S. Rep. 985, 75th Cong., 1st Sess. 2, 3 (1937); H.R. Rep. 1872, 75th Cong., 3d Sess. 1, 3 (1938). See, also, Cohen, *Handbook* 328-329; *Merrion*, 455 U.S. at 186-187 n.46 (Stevens, J., dissenting). Given these goals, it would be most strange to find that the new statute created a radical distinction between Indian Tribes that had organized under the I.R.A. and those that had not—

preserving taxing authority over lessees for the first group, but abrogating it for the second. And, indeed, no such result can be attributed to the provision invoked, the proviso to Section 2 of the Act, 25 U.S.C. 396b:

Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to . . . [the IRA].

In practice, this proviso has no effect for most oil and gas leasing because the cited Sections of the I.R.A. do not authorize leases that continue in force indefinitely, so long as there is production "in paying quantities"—the almost universal formula.¹⁹ Nor can—or does—any I.R.A. constitution or charter authorize such long-term leases.²⁰

¹⁹ Section 16 of the I.R.A., 25 U.S.C. 476, does not confer any authority to lease, but merely permits the adoption of a constitution empowering the tribal council "to prevent the . . . lease . . . of tribal lands" (emphasis added). Section 17, 25 U.S.C. 477, provides for corporate charters which may empower the tribe to lease its lands, but not "for a period exceeding ten years." It should be noted that even this limited leasing power is not shared by all I.R.A. Tribes, but only those that obtained federal charters. See Op. Solic. Interior Dep't M-36040 (1950), reprinted in 2 *Opinions of the Solicitor of the Interior Relating to Indian Affairs* 1530. As of 1947, of the 195 Tribes covered by the I.R.A., only 131 had obtained corporate charters. Haas, *supra*, at 3, 21-30. In most cases, moreover, the charter continued to require Secretarial approval for leases, at least for a time. Cohen, *Handbook* 329-330 & n.475.

²⁰ In this context—disposition of tribal property or interests therein—express Congressional permission is required because of the "rudimentary" principle (*Owens Indian Nation v. County of Owens*, 414 U.S. 661, 670 (1974)), incorporated in the Non-Intercourse Act (25 U.S.C. 177), that Indian Tribes may not alienate their lands without the approval of the United States. This is, of course, in sharp contrast to the power of taxation, of which the Tribes have not been divested by virtue of their dependent status. *Coleville*, 447 U.S. at 153-154.

Thus, the upshot is that I.R.A. Tribes, like all others, are governed by the 1938 Act and the implementing regulations in respect of their oil and gas leasing. That was true in the case of the Jicarilla Apache Tribe involved in *Merrion*. See 455 U.S. at 135. And yet, of course, the Court there vindicated the tribal severance tax.²¹

Merrion thus forecloses—as against *all* Tribes, including the Navajo—petitioners' extreme contention that the 1938 Act wholly preempts tribal taxation of mineral production. What remains to be dealt with is a clumsy half-argument: that although not strictly preempted, tribal taxing power has been hobbled by a requirement of obtaining Secretarial approval in each case. This is an unusual proposition, to say the least, since it attributes to Congress the view that federal regulation of leases and tribal taxation of mineral production are *not* inconsistent in principle, and, at the same time, supposes that Congress invited the Secretary of the Interior to override its determination if he disagreed. Cf. *Tooahnippah v. Hickel*, 397 U.S. 598, 608-609 (1970). And, stranger still, it is said that the Secretary is not merely *empowered* to review tribal tax ordinances if and when he deems it necessary, but is *commanded* to do so in every case, regardless of his conclusion that such screening is not needed.

We may assume that, if he deemed it appropriate, the Secretary *could* promulgate regulations—whether under Section 4 of the 1938 Leasing Act, 25 U.S.C. 396d, or the

²¹ To be sure, the Court in *Merrion* quoted both the proviso to Section 2 of the 1938 Act (25 U.S.C. 396b) and the implementing regulation (25 C.F.R. 171.29 (1980), now 25 C.F.R. 211.29 (1982)). 455 U.S. at 150 & n.15. But there is no reason to suppose the Court considered these provisions critical. On the contrary, the Court prefaced its consideration of the preemption argument by quoting the caution from *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978), to "tread lightly" (455 U.S. at 149), and the Court had no difficulty rejecting the contention that the Act of Mar. 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. 398a *et seq.*, had preempted tribal taxing power, albeit this statute of course contains no saving proviso for I.R.A. Tribes. 455 U.S. at 150-151.

more general authority given in 25 U.S.C. 2 and 9—requiring submission for approval of tribal ordinances taxing mineral production. But it simply does not follow that he *must* do so—or must review such ordinances even though he has declined to establish a regulatory procedure to that end where tribal law is silent. To read such a rule into the 1938 Act offends every applicable canon of construction. There are no “clear indications” of congressional intent to diminish tribal sovereignty in this way. *Merrion*, 455 U.S. at 149, 152. On the contrary, the purpose of the legislation—implementing the policy of the I.R.A.—to further tribal self-determination and self-sufficiency would be impaired by inferring such a condition. In these circumstances, it would be wholly inappropriate to impose upon the Secretary unwanted authority which Congress never expressly conferred and which, where given by tribal law, the Secretary is methodically retroceding.

8. Finally, we notice the objections interposed on the ground that the Navajo Tribe in particular, or at least its Council, lacks the requisite power to enact the taxing ordinance in suit. That is a truly extraordinary proposition as addressed to what is by far the most numerous Indian Tribe, with the largest Reservation, extending into three states and greater than the area of eight states. See *Getches, et al., supra*, at 4, 6. Nor does size alone distinguish the Navajo Tribe. It has been the focus of four of this Court’s modern landmark decisions stressing the survival of Indian Tribes as separate sovereignties and the continuing “authority of Indian governments over their reservations.” *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. at 689-690; *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 170 & n.6, 174-175, 179 (1973); *United States v. Wheeler*, 435 U.S. 313, 322-324, 326-327 (1978). It must come as a surprise to all to hear that the Navajos have failed to so order their affairs as to enjoy power to enact viable ordinances.

One remarkable suggestion is that the Navajos were divested of taxing authority by rejecting the I.R.A. in 1934 or by failing to adopt a constitution under Section 6 of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. 636. There is simply no basis in either statute for attributing to Congress any intent to “punish” Tribes that declined the offer by stripping them of preexisting powers. In the case of the I.R.A., there were, to be sure, some *additional* benefits—notably, financial help—that were reserved for Tribes accepting the new regime. See, *e.g.*, 25 U.S.C. 470. But, as the Court has firmly held in *Colville* and *Merrion*, the power to tax nonmembers doing business on the Reservation is not new; nor does it derive from federal law. We cannot suppose—in the absence of the slightest hint—that Congress offered the Tribes the skewed choice suggested by petitioners and some of the amici: “If you do not accept the advantages we now tender, we will take away some of the prerogatives you presently enjoy.” Indeed, *Colville* expressly recognizes the continuing power of two “dissenting” Tribes (the Colville and the Lummi) to tax non-Indians doing business on the Reservation. See 447 U.S. at 143 n.11.

Equally insubstantial are arguments based on the failure of the Navajo to adopt a written constitution outside the I.R.A. or the history of the present Tribal Council as a creation of the Bureau of Indian Affairs. Only the most insular perspective would view a governmental body as lacking legitimacy or plenary authority merely because its pedigree is not traced to a popular constitutional convention and its powers are not defined by an entrenched constitution. One need only consider the British Parliament, which, from year to year, defines its own authority and evolved from a council of royal appointees. The first principle of sovereignty, after all, is that the form of government is a matter for self-determination. See 55 Interior Dec. at 30-32. It is quite enough that, today, the Navajo Tribal Council is popularly elected and, in the view of both the members of the Tribe and the Depart-

ment of the Interior, enjoys full legislative powers.²² This Court, we may add, has itself recognized the independent authority of the Navajo Council. *United States v. Wheeler*, 435 U.S. at 327-328. There is no ground whatever for treating this council as less independent or less authoritative than other tribal governmental bodies. On the contrary, because no provision of tribal law imposes any limitation on the powers of the Navajo Council, it is to be presumed that its acts are fully authorized—except only as they might transgress limits defined by federal law.

9. A circuitous road has led us back to the starting place. Given the now firm commitment of Congress to a policy of strengthening tribal self-government and promoting self-sufficiency,²³ we ought not strain old words to eke out a congressional intent to compel a reluctant Interior Department to review tribal taxing ordinances that bear against nonmembers who do business on the Reservation. See *Bryan v. Itasca County*, 426 U.S. 373, 388-389 n.14 (1976); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976). But, even if "clear indications" to that end were not required, there would be no basis for inferring such a result in any legislation enacted by Congress. See *Merrion*, 455 U.S. at 151-152. The conclusion must be that where tribal law does not provide otherwise—as it plainly does not in the case of the Navajo—the Tribe is free to tax business activity within its territory without first obtaining permission from the Secretary of the Interior.

²² The position of the Department is sufficiently reflected in the Memoranda of June 1959 (J.A. 66) and May 1978 (J.A. 70) in the record of this case.

²³ *E.g.*, Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77, 25 U.S.C. 1451 *et seq.*; Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, 25 U.S.C. 450 *et seq.* See *New Mexico v. Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 11 & n.17; *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59-60, 62-66.

This is no anomaly. It may be that the laws protecting tribal Indians from unscrupulous or unfriendly neighbors can be relaxed today. But it is not difficult to appreciate why Congress deemed it necessary, even in modern times, to interpose the supervision of the Interior Department when the Tribe or its members were being invited to alienate or encumber the land or to enter into long-term contracts, as with attorneys, or to buy goods on the Reservation. So, also, experience fully justified erecting a substantial shield to insulate the Reservation from the intrusion of State regulation and taxation. In both cases, Congress was discharging its responsibility as guardian of the Indians by *protective* legislation. Obviously, no such purpose would be served by hobbling the tribal power of taxation, the exercise of which against nonmembers cannot victimize the Tribe.

Fifty years ago, it is true, the Department of the Interior thought it prudent to screen such tribal tax proposals. That was presumably appropriate because of the disorganized and wholly dependent status of most Tribes, so unused to wielding sovereign power that, absent guidance, they might act improvidently. Even then, there were recognized exceptions. But, at all events, the direction is now firmly reversed and the Department is encouraging all Tribes to revise tribal law, where necessary, so as to dispense with the self-imposed requirement of submitting taxing ordinances to Secretarial approval.

The consequence is in no sense unjust. This Court has already vindicated the propriety of a Tribe taxing mineral activities within the bounds of the Reservation, where it provides substantial services. *Merrion*, 455 U.S. at 156-158. Indeed, the Court has suggested that, in this setting, the tribal tax has a stronger claim to legitimacy than one imposed on the same activity by the State. *Id.* at 158-159 n.26. There is no reason to fear that any Indian Tribe, or the Navajo in particular, will abuse the privilege if not checked by the Secretary. Certainly, the taxes in suit cannot be characterized as excessive. Nor is

it reasonable to suppose that, today, Tribes will be so unwise as to drive away potential taxpayers with vexatious assessments. More than ever, Reservation Indians must rely on their own revenues and they are far too cautious than to kill the goose that lays the golden egg.

Nor are the tribal taxes objectionable because they impose "taxation without representation." That is not the unique situation of nonmembers on an Indian Reservation, as is plain enough to residents of the District of Columbia, taxed and ultimately ruled by a Congress in which they have no voting representative. Certainly, petitioner has no standing to complain, being a foreign corporation (J.A. 6) with no greater vote in the Legislatures of New Mexico and Arizona than in the Navajo Tribal Council. Cf. *Thomas v. Gay*, 169 U.S. 264, 275-278 (1898). Besides, Secretarial review is not a remedy for the complaint. It would be strange indeed to view the Secretary of the Interior, who is charged with safeguarding tribal interests, as the "representative" of mineral lessees. Unsurprisingly, the Secretary has never disapproved a tribal tax bearing on non-Indians on the ground that no tax was appropriate or that the one proposed was too onerous. Nor do his new *Guidelines* authorize disapproval on such a basis. See Appendix to Respondents' Brief. If any check on tribal actions is needed, beyond self-restraint informed by self-interest, Congress is the appropriate agency to provide it. There is no question about congressional power to intervene should Indian Tribes act irresponsibly.

In the meanwhile, it is not open to argument that an Indian Tribe enjoys "the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory" (*Morris v. Hitchcock*, 194 U.S. at 389) and that one of those conditions may be subjection to taxation in respect of activities undertaken on the Reservation, even if the actual tax was not announced in advance (*Merrion*, 455 U.S. at 137-148). We are not dealing with home-

steads who were in some sense "invited in" by Congress through the General Allotment Act or some "opening up" legislation. Cf. *Montana v. United States*, 450 U.S. 544, 559-560 & n.9 (1981). Petitioner is simply a private commercial venture seeking profit from business operations on tribal lands and cannot complain when the local government follows familiar tradition and imposes a tax on that privilege. Cf. *United States v. Mazurie*, 419 U.S. 544, 557-558 (1975); *Williams v. Lee*, 358 U.S. at 223.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE

Solicitor General

F. HENRY HABICHT II

Assistant Attorney General

LOUIS F. CLAIBORNE

Deputy Solicitor General

JOHN A. BRYSON

Attorney

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